Supreme Court of the United States

October Term, 1964

No. 52

JAMES A. DOMBROWSKI and SOUTHERN CONFERENCE EDUCATIONAL FUND, INC.,

Appellants,

BENJAMIN E. SMITH and BRUCE WALTZER,

Appellants-Intervenors,

against

JAMES H. PFISTER, individually and as Chairman of the Joint Legislative Committee on Un-American Activities of the Louisiana Legislature, RUSSELL R. WILLIE, individually and as Major of the Louisiana State Police Department, JIMMIE H. DAVIS, individually and as Governor of the State of Louisiana, JACK P. F. GREMILLION, individually and as Attorney General of the State of Louisiana, COLONEL THOMAS D. BURBANK, individually and as Commanding Officer of the Division of Louisiana State Police, and JIM GARRISON, individually and as District Attorney for the Parish of Orleans, State of Louisiana,

Appellees.

BRIEF FOR APPELLEE JIMMIE H. DAVIS

ROBERT H. REITER
1311 G Street, N.W.
Washington, D.C.

Attorney for Appellee Jimmie H. Davis

TABLE OF CONTENTS

TABLE OF CASES

Table of Cases (Continued)

Supreme Court of the United States

October Term, 1964

No. 52

JAMES A. DOMBROWSKI and SOUTHERN CONFERENCE EDUCATIONAL FUND, INC.,

Appellants,

BENJAMIN E. SMITH and BRUCE WALTZER,

Appellants-Intervenors,

against

JAMES H. PFISTER, individually and as Chairman of the Joint Legislative Committee on Un-American Activities of the Louisiana Legislature, RUSSELL R. WILLIE, individually and as Major of the Louisiana State Police Department, JIMMIE H. DAVIS, individually and as Governor of the State of Louisiana, JACK P. F. GREMILLION, individually and as Attorney General of the State of Louisiana, COLONEL THOMAS D. BURBANK, individually and as Commanding Officer of the Division of Louisiana State Police, and JIM GARRISON, individually and as District Attorney for the Parish of Orleans, State of Louisiana,

Appellees.

BRIEF FOR APPELLEE JIMMIE H. DAVIS

QUESTIONS PRESENTED

1. Whether a federal district court has jurisdiction to enjoin a state criminal proceeding under a state statute, when at the time of filing of the action in the federal court a grand jury had received instructions to investigate violations of the statute on the part of the plaintiffs, and documents had been subpoenaed for presentation to the grand jury.

2. Whether a federal district court has discretionary power to defer to the state courts for the determination of

the constitutionality of a state statute in the course of the criminal proceeding, and if so, to what extent the exercise of such discretion may be reviewed on appeal.

STATEMENT OF THE CASE

According to the allegations of the pleadings and the affidavits of appellants, on October 2, 1963 appellees Pfister and Willie attempted to obtain the prosecution of appellants by obtaining warrants of arrest and search warrants based on sworn affidavits alleging that appellants had conspired to violate Louisiana Revised Statutes 14:358 and 14:390, *et seq*. The warrants of arrest were vacated, but appellee Pfister threatened to obtain new prosecutions and hold legislative hearings. (R. 3) On November 8, 1963 the Joint Legislative Committee on Un-American Activities of the Louisiana Legislature held a hearing, at which time photostats of certain documents seized on October 4, 1963 under the search warrants were utilized, and announced their intention of delivering to appellee Garrison copies of the documents for the purpose of presenting them to the Orleans Grand Jury for institution of criminal proceedings under the same statutes. (R. 3-4) Appellants Walzer and Smith in October 1963, petitioned the Criminal District Court for the Parish of Orleans for a pre-trial hearing, so that whatever evidence existed against them could be brought to the attention of the court. (R. 52)

Thereafter, the Executive Assistant of the District Attorney for the Parish of Orleans informed appellants Smith and Walzer following November 8, 1963 (1) that the District Attorney's office had subpoenaed the copies of the records used by the Committee, (2) in turn the Orleans Parish Grand Jury had subpoenaed copies of the records from the District Attorney's office, (3) the Grand Jury was to meet on November 20, 1963, at which time this evidence would be presented to the members of the Grand Jury, which had been charged by the Honorable Malcom

O'Hara, Judge of the Criminal District Court to investigate the Southern Conference Educational Fund, Inc. (hereinafter referred to as SCEF) and its officers. (R. 20, 52-53) On November 15, 1963, it was reported in the public press and via radio and television that the Criminal District Court had charged the Orleans Parish Grand Jury with responsibility for investigating violations of the above statutes. (R. 59) The present suit was commenced on November 12, 1963, seeking injunctive action, and on November 18, 1963, Judge John Minor Wisdom signed a temporary restraining order, from which the members of the Orleans Parish Grand Jury and Judge Malcom V. O'Hara had been stricken. (R. 9-12) Hearing before the three judge court convened by the Chief Judge of the Fifth Circuit was held on December 9, 1963 and January 10, 1964, and on February 4, 1964 the application for injunction was denied. This appeal followed. Appellants are under indictment and awaiting trial.

ARGUMENT

1. The Issues in This Appeal Relate to the Jurisdiction and Injunctive Authority of the Federal Courts.

What this Court is called on to pass upon at this juncture is whether the complaints filed in the court below stated a cause of action on which relief could be granted by that court, and if so, whether the court below had within its discretionary authority the power to defer to the courts of the State of Louisiana.

Appellants address the major part of their argument to the proposition that the state statute under which the appellants were indicted is unconstitutional, both on its face and as applied to the appellants.

Even if this Court should be convinced that the statute involved here is unconstitutional, this conviction does not give the Court jurisdiction to make this determination unless the court below had jurisdiction to grant the relief

requested in the complaint, and unless the court below acted beyond its powers in deferring to the courts of the State. If the Court should decide that the court below acted contrary to law, still, if this Court is not to undertake piecemeal determination of the constitutional issues, it should remand the case for determination of the constitutional issues. Although the court below determined at one stage in its consideration of the complaints that the statute was not unconstitutional on its face, its decision was to dismiss the complaint for its failure to state a claim upon which relief could be granted (R. 63), on the ground that the injunctive relief requested could not be granted, and that the issue of constitutionality should be left for determination by the State courts in the course of the criminal proceeding, subject to appeal to this Court. (R. 72-74) Based on this decision, the court below refused to hear evidence as to whether the statute was unconstitutional as applied to the appellants.

Thus the court below has not passed on the constitutional issues, except as incidental to the jurisdictional questions. This Court does not have the benefit of either a record or a decision of any court below on these issues. The jurisdictional issues are the only ones properly before the Court.

2. A Federal District Court Cannot by Virtue of the Civil Rights Act Grant an Injunction To Stay a Criminal Proceeding in a State Court.

Title 28, Section 2283, of the United States Code, specifically provides that a federal court may not grant an injunction to stay proceedings in a state court, except as expressly authorized by Act of Congress or when necessary in aid of its jurisdiction, or to protect or effectuate its judgments. The present case is an injunction action against the prosecution of appellants by appellees in the courts of Louisiana under a Louisiana statute.

Section 2283 and its predecessors have been among the most widely litigated federal statutes, due to the sen-

sitive area of federal-state relationships in which they operate. This legislation originated in the Act of March 2, 1793, as an amendment to the Judiciary Act of 1789, establishing the federal courts (1 Stat. 73), and provided that no writ of injunction would be granted by a federal court to stay proceedings in any state court (1 Stat. 333). In 1874 a statutory exception was made with respect to bankruptcy proceedings (36 Stat. 1162). With only minor changes, the same provision was incorporated into the Judicial Code of 1911 as Section 265. However, in the writing of the Judicial Code of 1948, three exceptions were introduced into Section 2283: (1) express authorization by Act of Congress, (2) where necessary in aid of jurisdiction, and (3) to protect or effectuate judgments.

Certain decisions of this Court had engrafted additional exceptions. In *Wells Fargo & Co. v. Taylor*, 254 U.S. 175, 182, the Court indicated "that it was settled by repeated decisions and in actual practice that when the elements of federal and equity jurisdiction are present, the provision (Section 265) does not prevent the federal courts from enjoining the institution in the state courts of proceedings to enforce local statutes which are repugnant to the Constitution of the United States." The Court held in *Essanay Film Co. v. Kane*, 258 U.S. 358, 361, that in "exceptional cases the letter (of Section 265) has been departed from while the spirit of the prohibition has been observed."

However, in *Toucey v. New York Life Insurance Co.*, 314 U.S. 118, the Court held that the statute should be strictly construed, and indicated that the foundation of the *Wells Fargo* and *Essanay* decisions was very doubtful. The Court also by indirection cast doubt on two other decisions, *Ex parte Young*, 209 U.S. 123, and *Gunter v. Atlantic Coast Line*, 200 U.S. 273. In 1955, in *Amalgamated Clothing Workers v. Richman*, 348 U.S. 511, 514, the Court said:

> "We need not re-examine the series of decisions, prior to the enactment of Title 28 of the United States Code in 1948, which appeared to recognize implied exceptions to the historic prohibition against federal interference with state judicial proceedings. See *Toucey v. New York Life Insurance Co.*, 314 U.S. 118. By that enactment, Congress made clear beyond cavil that the prohibition is not to be whittled away by judicial improvisation . . . Legislative policy is here expressed in a clear-cut prohibition qualified only by specifically defined exceptions."

The Court referred to the Reviser's Notes in connection with Section 2283, which read as follows:

> "An exception as to Acts of Congress relating to bankruptcy was omitted, and the general exception substituted to cover all exceptions."

The Court also held that the fact that exclusive jurisdiction over the cause of action was given by Congress to the federal courts was immaterial.

Appellants argue that at the time the present action was filed, they had not been indicted, and therefore the bar of § 2283 does not apply. The record shows that arrest and search warrants had been issued and executed. The arrest warrants were vacated, but no action taken with respect to the search warrants. Appellants learned that copies of the documents seized under the search warrants, which had not been vacated, had been subpoenaed by the Orleans Parish Grand Jury, which had been charged by the presiding judge to investigate appellants and their organization, and appellants then filed the present action to enjoin appellees from proceeding under the asserted unconstitutional statute.

Thus this is rather different from the situation in *Ex parte Young, supra*, where the Court did not in its opinion make any more than passing reference to the fact that no "proceedings" had been undertaken at the time of filing of the federal action, without further discussion. The rate order complained of had not even become ef-

fective. Here there was at the time the federal suit was filed an outstanding search warrant, an investigation by a grand jury charged by the presiding judge to investigate appellants, and documents subpoenaed for presentation to the grand jury.

The question is whether these actions constitute "proceedings" under Section 2283. In *Hill v. Martin*, 296 U.S. 393, 400, the Court held as to the term "proceedings" as used in Section 265, the immediate predecessor of Section 2283:

> "That term is comprehensive. It includes all steps taken or which may be taken in the state court or by its officers from the institution to the close of the final process . . . It applies alike to actions by the court and by its ministerial officers."

The Court cited *Hyattsville Building Association v. Gouic*, 44 App. D.C. 408, 413, where the Court of Appeals for the District of Columbia held that the term "proceedings" referred to "a prescribed course of action for enforcing a legal right and necessarily entails the steps by which judicial action is invoked."

In *Hale v. Henkel*, 201 U.S. 43, 66, this Court said as to grand jury proceedings:

> "While there may be some doubt whether the examination of witnesses before a grand jury is a suit or prosecution, we have no doubt that it is a 'proceeding' . . . The word 'proceeding' is not a technical one, and is aptly used by courts to designate an inquiry before a grand jury."

The basis for the grand jury was explained in *Cobbledick v. United States*, 309 U.S. 323, 327, in the following terms:

> "The Constitution itself makes the grand jury a part of the judicial process. It must initiate prosecutions for the court to which it is attached and to which, from time to time, it reports its findings."

See also *Hemans v. United States*, 163 F.2d 223, 236 (C.C.A.6, 1947), *Society of Good Neighbors v. Groat*, 77 F. Supp. 695, 698 (D.C. Mich., 1948), and *State v. Rodrigues*, 219 La. 217, 52 So. 2d 756, 758.

Appellants also argue that the Civil Rights Act, which vests jurisdiction in the federal courts to redress Constitutional deprivations, was intended to authorize injunctive relief against state court proceedings. This Court has not passed on the effect of this statute (42 U.S.C. 1983) on the prohibition of Section 2283, and the legislative history provides no indication in this respect. The recent decision of the Fourth Circuit in *Baines v. Danville*, decided August 10, 1964, holds that the conferring of federal jurisdiction to redress civil rights violations is not an exception to the prohibition on injunctions against state court proceedings. See also *Smith v. Village of Lansing*, 241 F.2d 856, and *Goss v. Illinois*, 312 F.2d 257, decided by the Seventh Circuit.

It is notable that after the Civil War, when the original Civil Rights Act was passed, and the Act of March 2, 1893 (1 Stat. 333) then existing was an absolute prohibition against injunctions being granted to stay proceedings in any state court, the Congress did not see fit to change this prohibition. The conditions existing in the state courts in the South in the post-Civil War period, which led to the enactment of the Civil Rights Act giving the federal courts concurrent jurisdiction in any case involving asserted deprivations of constitutional rights, still did not lead to a dilution of the anti-injunction provision. At that time it could not be asserted that the Civil Rights Act fell within the exceptions provided by statute to injunctive actions, since no provision for such exceptions existed until 1874, when the 1893 statute was amended as to bankruptcy actions only. The language was broadened into its present form only in 1948.

3. Assuming the Existence of Jurisdiction To Grant Injunctive Relief Against the Prosecution of Appellants in the State Courts, the Record in This Case Does Not Establish the Extraordinary Circumstances Required Before Equitable Relief Will Be Granted.

Along with the statutory ban on federal injunctive authority over state court proceedings, the federal courts have applied a strict rule of equitable absentation to actions involving attacks on state statutes except in only the most extraordinary situations. This Court has held that when equitable interference with state action is sought in federal courts, judicial consideration of acts of importance primarily to the people of the state should as a matter of discretion be left by the federal courts to courts of the legislating authority, unless exceptional circumstances command a different course. *Stainback v. Mo Hock Ke Lok Po*, 336 U.S. 363, 383.

The court below in the present case decided that under the circumstances of the case, it should not interfere with the state prosecution. Appellants ask this Court to override the discretionary power of the court below and substitute its judgment on conditions existing at the time and in the judicial district where the court convened.

What are the exceptional circumstances asserted by appellants? It should be noted that there was no hearing on this issue, and at this stage of the proceedings the only inquiry is whether the complaint makes out a prima facie case in this respect, subject to proof in the event the Court finds in favor of appellants. The court below would then have the responsibility of making fact findings in this respect.

The complaint alleged that the threats of appellees to enforce the statute were for the sole purpose of deterring, intimidating, hindering, preventing and depriving appellants, their friends, members and supporters,

who have been attempting to eliminate racial segregation peacefully through the exercise of their rights to freedom of speech, press, assembly and association, of their constitutional rights. (R. 4-5) The complaint of the intervening appellants also asserted that indictment of appellants is calculated to curtail the Civil Rights activities of appellants as effectively as could actual conviction, in that (1) charges and indictments of officers and members of Civil Rights organizations for alleged communist or subversive activity deter many from participation in or contribution to them, both by those who believe such charges to be true, and by those who know them to be false, the latter as a result of their fear of public embarrassment by popular disapproval of their association with a group so charged; and (2) the fund-raising ability of SCEF would be greatly hampered as would the number of active participants in its programs. (R. 28) Also the intervening appellants asserted that their law practice, including their ability to handle Civil Rights cases, could be and has been seriously affected adversely as the result of criminal charges or indictment alleging communist or subversive activity, the complete falsity of such charges being of little consequence. (R. 28)

These asserted consequences of the criminal proceedings against the appellants are of great importance, both to the livelihoods of the individual appellants and the work of SCEF. We as lawyers cannot help but sympathize particularly with the plight of a professional man indicted for commission of a crime. If the constitutionality of the statute under which appellants are indicted could be determined in a civil proceeding where the criminal penalties and atmosphere are not involved, this would certainly ameliorate the hardship to them. But what a precedent would be established! It would necessarily give rise to a race to the courthouses, state and federal, upon any word being received of grand jury investigations under a state statute.

We are all aware of the serious problems existing in the South in the civil rights area, but is the existence of this situation ameliorated by the exercise of federal jurisdiction to override state courts, in the absence of any assertion that justice will not be done in the courts of the state. No such allegation is made herein, and in fact, the actions of the judge of the Criminal Court for the Parish of Orleans in summarily vacating the arrest warrants, and of the Supreme Court of the State of Louisiana in declaring the predecessor statute to that involved in this appeal unconstitutional, indicate to the contrary. *State v. Jenkins*, 236 La. 300, 107 So. 2d 648.

Appellants rely largely on the recent cases under the Civil Rights Act as indicating a special situation requiring a jurisdictional precedent. In *Stefanelli v. Minard*, 342 U.S. 117, 121, this Court considered the effect of the Civil Rights Act on its previous position, and concluded:

> "Only last term we restated our conviction that the Civil Rights Act 'was not to be used to centralize power so as to repeal the federal system.' *Collins v. Hardyman*, 341 U.S. 651, 71 S. Ct. 937, 940, 95 L. Ed. 1253. Discretionary refusal to exercise equitable power under the Act to interfere with State criminal prosecutions is one of the devices we have sanctioned for preserving the balance."

This view of federal-state relations was followed as recently as the 1962 Term in *Cleary v. Bolger*, 371 U.S. 392, in state criminal prosecutions.

The fact that numerous members of a class are threatened with prosecution is not sufficient to establish extraordinary circumstances. *Douglas v. Jeanette*, 319 U.S. 157, 165. Nor is the claim of irreparable injury due to the inability to follow one's occupation sufficient. *Stainback v. Mo Hock Ke Lok Po, supra*. Only in the event it plainly appears that resort to state proceedings would not afford adequate protection might extraor-

dinary hardship be established, assuming Section 2283 is no bar. *Fenner v. Boykin*, 271 U.S. 240, 243. The claim of exceptional circumstances in the present case, other than the effect on appellants' activities, is the deterrent effect on the civil rights movement of possible prosecutions on the basis of the statute involved here. The existence of a criminal statute in any area of activity is bound to have an effect, and it is always possible that prosecutors may misuse their authority. There is, however, no indication of large scale prosecutions under this statute, and in such event the federal courts are always open. The prosecution of appellants has been withheld pending the outcome of this appeal, and it can in no event be a long period of time before the issue of the constitutionality of the statute is passed upon by the state courts, subject to review by this Court. Injunctions look to the future, and by the time this Court remanded the case to the court below for the hearing on the extreme hardship issue, such hearing held, and a decision reached, the criminal prosecution could be completed and appeal to the State Supreme Court might be well along. The indictment is effected, and the hardship necessarily resulting in the publicity of that fact has been done. The necessity of submitting to a trial, onerous as it is, is not the basis for a claim of denial of due process. *Wolf v. Colorado*, 338 U.S. 25. Nor is the imminence of prosecution alone a ground for relief in equity. *Beal v. Missouri Pacific Railroad Co.*, 312 U.S. 45.

For the purpose of this appeal the only issue is whether the complaint has stated a cause of action on which relief can be granted. Thus, assuming this Court finds that the court below had authority to grant injunctive relief despite Section 2283, and that the circumstances set forth in the complaint are so extraordinary as to require the court below to proceed to consider the constitutionality of the state statute, the only action this Court should take is to remand the case to the court be-

low for a determination as to whether the extraordinary circumstances can be proven. Until there is a judicial determination of fact in this respect, and a finding that such circumstances do exist to establish the basis for federal jurisdiction, the court below, and this Court, cannot proceed to make a determination on the constitutional issues. *Beal v. Missouri Pacific Railroad Co., supra*. Extraordinary circumstances must be determined on a case-by-case basis. *Baggett v. Bullitt*, 377 U.S. 360, 375. That case, a class action by approximately sixty four members of the faculty, staff, and student body, raised the jurisdictional issue only of whether a doubtful issue of state law existed requiring construction by a state court. No state criminal action existed, raising the jurisdictional issues involved in the present case.

A natural tendency may well exist to proceed with the consideration of the constitutional issues, even on the basis of the incomplete record before the Court. However, as Mr. Justice Holmes has said:

> "The relation of the United States and the Courts of the United States to the States and the Courts of the States is a very delicate matter that has occupied the thoughts of statesmen and judges for a hundred years and can not be disposed of by a summary statement that justice requires me to cut red tape and to intervene." — Memorandum of Mr. Justice Holmes in 5 *The Sacco-Vanzetti Case*, Transcript of the Record (Henry Holt & Co., 1929) 5516, quoted in the Court's opinion in the *Stefanelli* case, on page 124.

The result, as the Court said in the Douglas opinion, might well be to invite a flanking movement against the system of state courts by resort to the federal forum. In the present case, the Court could only, in any event, consider a part of the constitutional issue, whether the statute is unconstitutional on its face, since no evidence has been taken on its constitutionality as applied to appellants. Such piecemeal consideration does not accord

with proper appellate procedure, or the intention of Congress. *Douglas v. Jeanette, supra,* footnote at page 123.

Appellants would cast on appellees the burden of establishing that the court below was justified in not intervening to restrain the state court proceedings. Particularly in view of the exercise of discretion involved on the part of the federal courts in such cases, the burden is actually on the appellants to show that the court below had no basis for exercising its discretion in the manner it did. It is submitted that appellants' pleadings do not contain allegations that the courts of the State will not act promptly and with full regard for their rights, in the criminal proceedings against appellants, or of any extradordinary circumstances that would justify federal intervention to stay state proceedings.

Although it was not raised in the court below, the further threshold jurisdictional issue exists as to whether the complaint was not in fact against the State machinery of justice. Appellants asserted a conspiracy to deprive them of their constitutional rights, but alleged no facts indicating participation of any kind on the part of this appellee in any such conspiracy. The Complaint appears to name anyone connected with the State who might in any manner have any function in connection with a criminal prosecution, irrespective of whether they participated in the proceedings against the appellants. As said by the Court in *Oklahoma Packing Co. v. Oklahoma Gas & Electric Co.*, 309 U.S. 4, 8, 9:

> "The present suit, therefore, is for an injunction 'to stay proceedings' previously begun in a state court . . . That the injunction was a restraint of the parties and was not formally directed against the state court itself is immaterial."

See also, *H.J. Heinz Co. v. Owens,* 189 F.2d 505 (C.C.A. 9, 1951). This has particular significance in light of the fact that the action herein was based largely on the Civil Rights Act. *Cf. Monroe v. Pape,* 365 U.S. 167.

CONCLUSION

It is respectfully submitted that the judgment of the court below should be affirmed.

ROBERT H. REITER

1311 G Street, N.W.
Washington, D. C.

Attorney for Appellee
Jimmie H. Davis